

# **Indicting Ham Sandwiches: How to Challenge the Grand Jury Process**

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## **Grand Jury Case & Law Outline**

1. The Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, states in part:
  - a. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...
2. The State of South Carolina went so far as to place this protection within our own state constitution, being even more specific in describing what types of crime required indictment:
  - a. No person shall be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on presentment or indictment of a grand jury of the county where the crime has been committed...Article I, §11, South Carolina Constitution
3. **State v. Faile**, 43 S.C. 52 (S.Ct.1895) =
  - a. When an indictment is presented, the accused "may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined."
  - b. Overruled on other grounds, *State v. Torrence*, 305 S.C. 45 (1991).
4. **State v. Rector**, 158 S.C. 212 (S.Ct. 1930) =
  - a. SC Supreme Court affirmed trial court's quashing of murder indictment.
  - b. Language used in indictment and eligibility of GJ members were issues.
  - c. Oath: "the State's counsel, your fellows, and your own, you shall well and truly keep secret." At 225.
  - d. Case sought to clarify what remedy there was when GJ was composed of ineligible members. Basically, if all the GJ members are disqualified OR if there were only 12 and 1 of those was disqualified, making a defendant show prejudice is requiring him to do the

impossible: disclose GJ deliberations/voting which he can't know due to secrecy. At 228.

- e. “We are inclined to think also that one who demands and is refused the right to be tried for crime charged against him only upon an indictment presented by a legal grand jury, in instances where such indictment is required, may thereafter justly take the position that he has been ‘deprived of life, liberty or property without due process of law,’ in violation of the provisions of Section 5 of Article 1 of the Constitution, where the people of this State have made ‘Declaration of Rights.’” At 230.
- f. Quote at 230-231 from Sir William Blackstone: “And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite the spirit of our Constitution; and that though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.” Cooley’s Blackstone, 94<sup>th</sup> Ed.), Book IV, 350.
- g. Talked about *State v. Blackledge*, 7 Rich. 327 (1854) where prisoner sentenced to death challenged whether one of his GJ members was disqualified. Court of Appeals said his objection came too late, but if presented in time would have been just. Right to GJ: “These with other protections which are thrown around the prisoner by law, must be held inviolate.” “Well founded objections impugning these essential safeguards, are entitled to, and must receive just consideration, when presented at the proper time.” At 232.
- h. Cited *Crowley v. United States*, 194 U.S. 461 (1904): “It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment. It is his right, in the first place, to have the accusation passed upon before he can be called upon to answer the charge of crime, by a grand jury composed of good and lawful men.” *Crowley* at 473, *Rector* at 236.

- i. “While it may be that the right to have qualified jurors only to pass upon an indictment is not entirely identical with the right to have a fair and impartial grand jury consider the indictment, we think the two propositions are so closely analogous that decisions regarding the latter have bearing in considering questions relating to the former.” *At* 240.

- i. This quote came from *State v. Richardson*, 149 S.C. 121 (S.Ct. 1928), where the grand jury was drawn by jury commissioners who all held an interest in the bank the defendants were alleged to have wrecked. Defendants raised the issue too late.

**5. State v. Bramlett**, 166 S.C. 323 (S.Ct. 1932) =

- a. Defendant, county sheriff, filed motion that grand jury proceedings were improper. GJ issued no bill, but with statement that other indictments would follow. Court said that part of presentment, related to charges for which no indictments issued, was improper.
- b. “Grand juries are watchmen stationed by the law to survey the conduct of their fellow citizens, and inquire where and by whom public authority has been violated, or our constitution and laws infringed.” *At* 327-328.
- c. There was a question by presiding judge whether he had the authority to entertain a motion to expunge. Court made clear he did: “The Grand Jury, like the petit jury, is an integral part of the machinery of the Court, all of which is under the control and direction of the presiding Judge.” *At* 332.
- d. Court found it was error for Presiding Judge not to expunge improper part of the GJ’s finding.

**6. Margolis v. Telech**, 293 S.C. 232 (S.Ct. 1961) =

- a. Defendant husband had plaintiff sister-in-law arrested. Sister-in-law had cared for sister/wife, who died. Husband claimed she took clothing and jewelry. GJ refused to indict. Sister-in-law sued Husband for malicious prosecution.

- b. Husband Answered complaint claiming that when called as a witness before GJ, the indictment incorrectly charged sister-in-law with housebreaking. Upon suggestion by GJ member, he consented to the indictment being no-billed. Court ordered that portion of Answer stricken.
- c. Court said those allegations in Answer went towards the “deliberations” of the GJ, what induced them to return a “no-bill.” Any testimony that would go towards that, would be inadmissible.

**7. Ex parte McLeod, 272 S.C. 373 (S.Ct.1979) =**

- a. AG appealed trial court’s decision denying his request to enter the GJ room to examine and XE witnesses before that body and to allow a court reporter to transcribe the testimony heard by GJ.
- b. AG got GJ foreman’s permission, then asked trial judge to grant him or his assts right to enter and examine witnesses to assist GJ investigation. Asked for court reporter, who would be sworn to secrecy, with record sealed.
- c. Trial court denied the request, but allowed AG to submit either orally or in writing statement about investigation; full and complete summary of evidence; submit documents/statements/tapes/pictures, etc.; submit names of persons AG feels GJ should call and summaries of testimony to be secured from each witness; submit orally or in writing AG’s opinion of the law concerning the allegations of the investigation. *At 375.* Even said GJ could call a recess and consult with AG reps.
- d. AG just appealed findings that he couldn’t enter the room and examine or XE witnesses himself.
- e. “If, however, the fundamental principle of secrecy in grand jury proceedings as long followed in our prior decisions is to be changed, it should come as the result of a comprehensive study and evaluation of all facets of the question and not through a process of judicial erosion.” *At 378.*

**8. State v. Capps, 276 S.C. 59 (S.Ct. 1981) =**

- a. Court affirmed trial court denial of motion to quash based on asol participating as a witness before GJ.
- b. Ex parte McLeod, In Re: Investigation in Charleston Magistrate's Court, 272 S.C. 373 (1979), SC Supreme Court adhered to rule that GJ proceedings should remain non-adversarial, refused to permit the AG or his assistants to examine or cross-examine witnesses before GJ. *At 60*. But didn't address solicitor appearing as witness in GJ proceeding, therefore they did now.
- c. "*State v. McNich*, 12 S.C. 89 (1879), this Court held the solicitor has the right and duty to communicate with the grand jury relative to the manner in which they conduct their business and error is not presumed...In *State v. Williams*, 263 S.C. 290 (1974), we held an indictment based on hearsay was valid..." *At 60-61*.
- d. "Here, the only involvement of the asol was to present a summary of the evidence in the case to the grand jury." Trial court held asol didn't examine or XE any witnesses and was not present during deliberations; appellant not prejudiced by asol's presence as witness and no violation of appellant's const'l rights. "We agree..." *At 61*.
- e. "This court shares with the nation's founders a concern that on occasions prosecuting officers will expand too far and abuse the powers granted to them. A grand jury is not a prosecutor's plaything and the awesome power of the State should not be abused but should be used deliberately, not in haste." *At 61*.
- f. "The public policy of maintaining the secret and nonadversarial nature of GJ proceedings was not violated by allowing the asol to appear as a witness and present a summary of the evidence in this case." *At 62*.
- g. Talks about the difference b/n a solicitor appearing as a mere witness v. the sole witness. *Capps* court said "the practice of using a solicitor or other officer of the State, as the sole witness before the GJ, to provide only a summary of the evidence could be abused and we strongly suggest it be abandoned unless no alternative is available." *At 62*.
- h. Chief Justice Lewis wrote dissent:

- i. Lewis would've reversed. Very troubled that 20 cases were presented and no other witnesses were presented. At 63
- ii. Lewis felt that their call from *McLeod* for a comprehensive study and ultimate revision to the present system had not been heeded, so the Court was "compelled in the interests of justice to reevaluate the nature of the permissible involvement by attorneys for the State." His decision to reassess was influenced by "the significance of the right involved. Art. I, Sec. 11 of our State Constitution provided the foundation for GJ indictments. It requires presentment as a condition precedent to trial for the crime involved herein. *State v. Hann*, 196 S.C. 211. It is our duty to give this constitutional provision meaning." At 63-64.
- iii. Lewis felt a "pressing need for change as is evidenced by the further deteriorating nature of the proceedings" and wanted to "retreat" from *McLeod*. He wanted to let an atty for the State and court reporters be present while GJ in session, but no one present while GJ was deliberating or voting. At 64-65.
- iv. "The potential for abuse is even more prevalent in GJ proceedings, than in trial, because of its unilateral nature." At 66.
- v. "Finally, I note the need for preserving the public trust in the proceedings of the grand jury. See *U.S. v. BirdmanI*, 602 F.2d 547 (3<sup>rd</sup> 1979)... "Were we to allow a solicitor to merely 'tell his story' by giving a summary of the evidence, the function of this constitutionally mandated body would soon be viewed by a justifiably skeptical public as a mere plaything of prosecutors. This would have a detrimental effect since it is only through strong public support that or [sic] system may continue to serve." At 67.
- vi. Lewis would've quashed the indictment b/c he had issues with a prosecutor also being a witness, especially the sole witness. He also would've quashed it if the asol being a witness was proper b/c it was based solely on hearsay evidence.

- vii. “I would additionally hold that the routine acquisition of an indictment based solely on hearsay evidence requires the indictment be dismissed. Therefore, even assuming the assistant solicitor could act as a witness, the motion should have been granted.”
- viii. “Our Court previously indicated in *State v. Williams*, 263 S.C. 290, 210 S.E.2d 298, an opinion which I authored, that an indictment based solely on hearsay evidence did not violate the constitutional requirement of a grand jury indictment as a condition precedent to trial in such a case. However, it was never our intention or purpose to create a limitless haven for its routine use.

The deliberate use of hearsay testimony alone to obtain indictments is a questionable practice which seriously erodes the function of the grand jury. See *U.S. Gramolini*, 301 F.Supp. 39. It can be used to subject a defendant to the expense and humiliation of a public trial solely on the basis of evidence which is generally inadmissible in a trial.

In order to provide more than lip service to the constitutional provision here in question, I would hold that an indictment cannot, as a matter of course, be acquired solely on oral hearsay testimony. The routine practice of one individual appearing before the proceeding to give his “third hand” capsule version of facts which he has no direct knowledge without some other competent evidence, is insufficient.

The drafters of Article I, §11 as well as those citizens who voted for its implementation clearly intended the right to a grand jury indictment to be meaningful because they incorporated it into such a solemn document, our State Constitution. The disposition I propose seeks to rekindle the spirit with which it was created.” *At 67-68, emphasis added.*

**9. State v. Whitted, 279 S.C. 260 (S.Ct. 1983) =**

- a. Appellant challenged trial court's refusal to require State to disclose whether evidence allegedly favorable to appellant was presented to GJ, particularly, exculpatory statements made by appellant.
  - i. *Whitted* court cited *McLeod* for "Investigations and deliberations of a grand jury are conducted in secret and are, as a rule, legally sealed against divulgence" and talked about how changes should come as "result of comprehensive study and eval," etc language from *McLeod*. At 262.
- b. Also challenged sole witness against her at GJ was deputy sheriff. In doing so, she relied on *Capps* language re: sol or other officer of the State as a sole witness...
  - i. *Whitted* court said the "suggestion" from *Capps* "did not contemplate and should not be construed to prohibit the investigative officers, such as the sheriff's deputy was in this case, from appearing as the sole witness before the grand jury." And found no error. At 262.

**10.State v. Williams, 280 S.C. 305 (S.Ct. 1984) =**

- a. Nothing in record really tells why GJ was issue, but CJ Lewis again dissents:
  - i. "I adhere to my views expressed in *State v. Capps*. It is apparent that the majority view in *Capps* is now being used as a license to circumvent and eliminate a meaningful participation by the GJ in the judicial process. The cavalier treatment of this issue by the majority should be disturbing. I dissent and would reverse judgment." At 307.

**11.State Grand Jury Act = SC Code 14-7-1600 et seq., effective Feb. 8, 1989.**

**12.State v. Dawkins, 297 S.C. 386 (S.Ct. 1989) =**

- a. Defendant filed motion to quash at trial that was denied. Appealed. One ground was that indictments were obtained after asol appeared before GJ.
- b. *Dawkins* court affirmed trial court's refusal to quash, based on specific facts of the case. This was a case where defendant moved to quash also for original indictment being too broad. So asol went back and got four separate indictments for more specific time periods. While the asol was the only witness to appear before the GJ on the "new" indictments, this was the same GJ that had issued the original indictment after hearing "extensive testimony from the investigating officer." Plus, the facts of this particular case were such that GJ likely remembered the original presentment. *At 390.*
- c. While they held motion to quash was properly denied, "we reiterate our holding in *Capps* and caution prosecutors to avoid this practice." *At 391.*

**13.State v. Anderson, 439 S.E.2d 835 (S.Ct. 1993) =**

- a. Defendant appealed CoA decision affirming his conviction when only witness before the GJ was an asol. Court reversed.
- b. In responding to Defendant's motion to quash at trial, asol stated: "I would also agree ... that the particular case [*State v. Capps*, 276 S.C. 59, 275 S.E.2d 872 (1981)] did say they frowned upon it. They did not however, bar it. It has always been the practice of our office to do that. I think other Solicitor's Offices do that as well. But that was nothing -- that case did not say that we could not do it, they said they didn't like it." *At 835.*
- c. Even though the trial judge stated "I do think the Supreme Court has pretty strongly indicated that they do not approve and certainly would prefer another method. I don't think they have made it clear that that is inherently error in the cases and I will still deny the motion at this time." *At 835.*
- d. *Anderson* court cited *Capps* and Justice Lewis' dissent, saying we reiterated *Capps* in *Dawkins*, but since none of you are heeding that

warning, here you go: we “explicitly prohibit the practice of prosecutors appearing as the sole witness before the GJ.” At 836.

**14.State v. Thompson, 305 S.C. 496 (CoA 1991) =**

- a. Defendant appealed trial court’s refusal to quash his indictment one count CSC 1<sup>st</sup>. One ground for motion was that State withheld from GJ evidence that the child gave conflicting statements about the motel where the alleged crime took place.
- b. *Thompson* court thought this argument rested on “speculation by counsel.” At 501.
- c. “Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary. *Cf. State v. Griffin, 277 S.C. 193, 285 S.E.2d 193 (1981)* (in absence of evidence grand jurors were not sworn, Court held a presumption exists that grand jurors were sworn and, thus, upheld the indictment). Speculation about "potential" abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment. In saying this, we yield to no one in our zeal to insure that the grand jury continues to perform its historic function as a shield between the accused and abuse of the prosecutorial power of the State. The courts of South Carolina stand guard to see that the grand jury is not reduced to a "mere plaything of prosecutors." *State v. Capps, 276 S.C. 59, 67, 275 S.E.2d 872, 875 (1981) (Lewis, C.J., dissenting).*” At 502.

**15.State v. Thrift, 312 S.C. 282 (S.Ct. 1993) =**

- a. State grand jury case
- b. Case involved paving business (owned by Thrifts) and whether they had been bribing people to get contracts. One issue on appeal was whether introduction of refusal to take a polygraph to GJ was so prejudicial as to require dismissal of indictment. State appealed dismissal of indictments against certain defendants.
- c. While Chief Deputy AG was examining a Gilreath (district engineering admin w/ Highway Dept) before State GJ, he asked him a question which could only be answered by the witness referencing a

previously attempted polygraph. Gilreath answered he had refused to take the polygraph. Deputy AG did not stop witness and give curative instruction as legal advisor to GJ. Instead he continued to question him, then proceeded to call the polygraph examiner who testified he advise people not to take the examine if they are going to lie. Trial judge found these actions constituted prosecutorial misconduct and were so prejudicial to Gilreath that the charges against him were dismissed.

- d. “Ordinarily, we do not inquire into the nature and sufficiency of the evidence before a grand jury...An exception to this general rule exists where, as here, a defendant makes a colorable claim of prosecutorial misconduct.” At 302.
- e. “It is usually difficult for a defendant to make such a claim. The Court of Appeals in *State v. Thompson*, 305 S.C. 496, 409 S.E.2d 420 (Ct.App. 1991), held that, [s]peculation about ‘potential’ abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment.” *Thompson*, 305 S.C. at 502, 409 S.E.2d at 424. [Emphasis in the original]. Fortunately, given the nature of State Grand Jury proceedings, there is a complete record available for analysis.” At 302-3, emphasis added.
- f. “Where as here, there is a colorable claim of prosecutorial misconduct in the GJ proceeding, the next inquiry is whether the defendant was sufficiently prejudiced by the admission of the evidence so as to warrant dismissal of the indictment.” At 303.
- g. The *Thrift* court actually reversed the trial court’s finding of prosecutorial misconduct, finding the Deputy AG faced a novel issue of law in deciding whether to present the polygraph evidence [to a grand jury is what they meant]. Said that the fact they now found such evidence inadmissible does not detract from the fact that the record discloses no evidence of any improper motive or improper conduct on the AG’s part. They said the AG handled the case in “complete good faith and in accord with the highest ethical and professional standards.” At 303. HOWEVER...

- h. Despite finding “no prosecutorial misconduct here, we nonetheless address the prejudice prong because of the colorable claim of prosecutorial misconduct...” The *Thrift* court nonetheless found the presentation of the evidence was “severely prejudicial” and affirmed the trial court’s finding of prejudice.” At 303. So...NO prosecutorial misconduct, BUT there was prejudice from a “colorable claim of prosecutorial misconduct”
- i. What remedy? *Thrift* said US Supreme Court in *Bank of Nova Scotia v. US*, 487 U.S. 250 (1988) held “the dismissal of an indictment for non-constitutional error was only appropriate if it was established that the violation substantially influenced the GJ’s decision to indict, or there is grave doubt that the decision to indict was free from substantial influence of such violations.” At 303-304.
  - i. “The present facts are well within the parameters established in *Bank of Nova Scotia*. Under the *Amerson* standard, the extensive testimony elicited about the polygraph refusal, especially without any instruction to the State Grand Jury, coupled with the State’s acknowledgment of the weakness in its case against Gilreath, support the trial judge’s finding of prejudice sufficient to warrant dismissal of the indictment.” At 304.
    - 1. Footnote to the above in *Thrift* opinion: “It is noteworthy that a grand jury was originally used to protect the citizenry from abuses by the crown. The evolution in the United States was to serve the same purpose. The prosecutor should present the evidence and instruct the law. The grand jury is more than a mere instrument of the prosecution.” *Fn.15 at 305*.
- j. Subsequently, the Supreme Court issued an opinion **State v. Thrift**, 44 S.E.2d 341 (1994) that changed some language from the previous opinion, but nothing impacting the grand jury stuff above.

**16. *Evans v. State*, 363 S.C. 495 (S.Ct. 2005) =**

- a.** State GJ case.
- b.** *Evans* filed PCR where he sought the “files of the state grand jury.” Parties agreed to have documents submitted to PCR judge for in camera review. That was done. PCR Judge found everything was ok with grand jury. Specifically found that the documents provided Petitioner no information he had not already received from State, i.e., transcripts of witnesses’ testimony and documentary evidence presented to grand jury. *At 502.*
- c.** Petitioner challenged that he never got the impanelment documents.
- d.** *Evans* court found that impanelment documents, including State’s petition, supporting materials, and the impaneling judge’s order, may be released to a defendant prior to trial upon timely request or to an applicant in a PCR proceeding. *At 504.*
- e.** State GJs are created by statute. S.C. Code 14-7-1770 deals specifically with the sealing of records, orders and subpoenas of the SGJ. However, *Evans* court noted the language of 14-7-1770 “indicated that at some point, matters other than the GJ’s deliberations and voting may be disclosed to a defendant. Removing the veil of secrecy after a defendant has been indicted is consistent with the legislative intent expressed in 14-7-1770 and the Act as a whole.” *At 504.*
- f.** The *Evans* court engaged a pretty detailed analysis of “Secrecy provision and concerns.” While a lot of that involved looking at the statute for SC’s State GJ system, it also involved looking at the historical nature of GJs in general:
  - i.** “We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy grand jury proceedings. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover,

witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held to public ridicule.” *At 505-506*, citing *United State v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) and other case law.

- ii. “The secrecy provisions applicable to a particular case are relaxed after an indictment has been issued by the state grand jury. All proceedings and testimony before the state grand jury are recorded by a court reporter, except the grand jury’s deliberations and voting. A defendant is entitled to review and reproduce recorded materials of those proceedings, subject to the limitations contained in Sections 14-7-1720, 14-7-1770, and Rule 5 SCCrimP, 14-7-1700. A defendant’s right to obtain such information in preparing his defense necessarily arises post-indictment. *Rector.*” *At 506-507*.
  - iii. “Although maintaining secrecy is essential while a matter is under deliberation by the grand jury, such concerns diminish following issuance of a true bill of indictment. A defendant is allowed to obtain and use the impanelment documents in preparing a defense and ensuring protection of his due process rights.” *At 507*.
- g. Challenging legality of GJ: Lot of discussion about indictments and *Gentry*.
- i. The required notice (i.e., indictment) “is a component of the due process accorded every criminal defendant.” *At 508*, citing 5A to US Cnst and Art I, Sec. 3 of SC Cnst.
  - ii. Indictment is required by SC Cnst Art. I, Sec. 11 and Art. V, Sec. 22.

- iii. *Evans* court noted their case didn't involve sufficiency of indictment, rather "the legality and sufficiency of the process of the state grand jury which issued the indictment." They noted that in *Gentry*, they had stated:
  - 1. "when the indictment is presented, that accusation made, that pleading filed, the accused has two course of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge." At 509, citing *Gentry* at 13.
  - 2. "A defendant has a constitutional right to demand that a grand jury which is properly established and constituted under the law consider the criminal allegations against him. One who demands and is refused the right to be tried for crime charged against him upon an indictment presented by a legal grand jury, in instances where such indictment is required, may thereafter justly take the position that he had been deprived of life, liberty or property without due process of law in violation of the state constitution." At 509, quoting *Rector*.
- iv. The *Evans* court applied *Gentry* in finding that "a defendant must challenge the legality and sufficiency of the process of the state grand jury before the jury renders a verdict in order to preserve the error for direct appellate review." At 509.
- v. "When a defendant timely moves to quash an indictment on grounds such as those further explained below, the circuit court must determine whether the defendant's constitutional right to have the criminal allegations against him weighed by a properly constituted grand jury has been violated." At 510.
  - 1. Those grounds as mentioned above were:

- a. An indictment that is deemed a nullity b/c the GJ is established or constituted illegally. Ex. Grand jurors selected in an illegal or discriminatory manner.
- b. Lesser irregularity rising to level of constitutional violation. Ex. Disqualification of one Grand juror.

-In the two classes above, Court must strike down indictment otherwise defendant's constitutional right to demand that his case be considered by a grand jury properly established and constituted under the law would have no force or effect. *At 511.*

- c. 3<sup>rd</sup> category: Defendant may assert a truly minor irregularity in the functioning or processes of the grand jury. These are challenges that do not implicate the legality of the GJ or constitute a lesser irregularity which rises to the level of a cnst'l violation. (Ex. Some ballots had blue lines and some red). Ordinarily, courts shouldn't quash indictment when defendant asserts a truly minor irregularity. *At 513.*

- h. In sum, *Evans* court found defendants were entitled to review impanelment documents in order to timely make such motions per *Gentry*. And courts may release such documents to a defendant after the state GJ has issued a true bill of indictment against that defendant. "A defendant's request should be made prior to trial pursuant to Rule 5 SCCrimP. If the State should object to releasing all or part of the impanelment documents, a defendant may move to compel discovery of the documents. See Rule 5(d), SCCrimP. The burden of proof is on the State to demonstrate why the documents should not be released because only the State possesses the necessary information to analyze

the issue and explain to the court why releasing the documents should be prohibited or delayed.” *At 513*, citing *Rector*.

- i. “The regularity of GJ proceedings is presumed absent clear evidence to the contrary.” *At 514*, quoting *State v. Griffin*, 277 S.C. 193 (1981). “Thus after a defendant obtains the requested information, the burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury or its proceedings is predicated. *At 514*, citing *State v. Jackson*, 240 S.C 238 (1962).

**17. State v. Moses**, 390 S.C. 502 (CoA 2010) =

- a. “Grand Jury proceedings are presumed to be regular unless clear evidence indicates otherwise.” *At 521*, citing *State v. Thompson*, 305 S.C. 496 (1991).

**18. Rule 3.3(d)**, Rules of Professional Conduct, “Candor Toward the Tribunal.”

- a. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not those facts are adverse.
- b. Rule 3.3 directs readers to Rule 1.0 for the definition of “tribunal.”

**19. Rule 1.0** defines:

- a. “Tribunal” denotes a...body acting in an adjudicative capacity. A...body acts in an adjudicative capacity when a neutral officer, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular manner. Rule 1.0(p), Rules of Professional Conduct, “Terminology.”

**20. Rehberg v. Paulk**, 132 S. Ct. 1497 (2012) =

- a. 1983 suit against cop for testimony to GJ. SCOTUS said witnesses before GJs are entitled to absolute immunity just like witnesses at trial. Why? B/c the justifications are the same:

- b. “The factors that justify absolute immunity for trial witnesses apply with equal force to grand jury witnesses. In both contexts, a witness’s fear of retaliatory litigation may deprive the tribunal of critical evidence.” *At 1505*.
- c. SCOTUS considers GJ tribunals.

## 21. Grand Jury Charge

- a. <http://www.judicial.state.sc.us/juryCharges/GS%20InstructionsJune2013.pdf> - Chapter Two
- b. “The Grand Jury is not only a way to bring to trial people accused of crimes, but also a way to protect citizens against unfounded prosecution.”
- c. “The Grand Jury may exercise its discretion to decide, not only the probability of conviction or the sufficiency of the evidence, but also if it is proper, under the particular circumstances, to prosecute the person and the effect on the public interest by prosecuting the charge. In other words, the Grand Jury should decide whether or not the case is one which should go to trial.”
- d. “On the back of the indictments, the names of the witnesses for the State will be listed. You may call the witnesses before you for questioning. You do not have to examine all of them in every case, since some cases the testimony of one witness may convince you that the accused should go to trial. If so, you do not have to examine the other witnesses. However, do not find a “No Bill” without examining all witnesses because the last witness may know facts which the others did not know. The Foreperson of the Grand Jury will swear the witnesses whose names appear on the bill of indictment. No witness may be sworn except those who have been bound over or subpoenaed in the manner provided by law.”
- e. “The presence of anyone other than Grand Jurors, witnesses under examination, and, at certain times, the Solicitor, during the sessions of the Grand Jury is unauthorized. Thus, any attempt to influence your decision is clearly improper and should be reported to me or the presiding judge.”

**22. S.C. Code 14-7-1550:** Authority of grand jury foreman to swear witnesses; procedures to obtain attendance of witnesses.

The foreman of the grand jury or acting foreman in the circuit courts of any county of the State may swear the witnesses whose names shall appear on the bill of indictment in the grand jury room. No witnesses shall be sworn except those who have been bound over or subpoenaed in the manner provided by law. In order to obtain attendance of any witness, the grand jury may proceed as provided by the South Carolina Rules of Civil Procedure and Sections 19-9-10 through 19-9-130.

S.C. Code 14-7-1550, emphasis added.

**23.S.C. Code §14-7-1700:** Record of testimony and other proceedings of grand jury; furnishing of copy to defendant; transcripts, reporter's notes and all other documents to remain in custody and control of attorney general.

*(This statute shows the disparity between the county grand jury and state grand jury systems in SC)*

A court reporter shall record, either stenographically or by use of an electronic recording device, all proceedings except when a state grand jury is deliberating or voting. Subject to the limitations of Section 14-7-1720(A) and (D) and Rule 5, South Carolina Rules of Criminal procedure, a copy of the transcript of the recorded testimony or proceedings requested by the Attorney General or his designee shall be provided to the defendant by the court reporter, upon request, at the transcript rate established by the Office of Court Administration. An unintentional failure of any recording to reproduce all or any portion of the testimony or proceedings does not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom and all books, papers, records, correspondence, or other documents produced before a state grand jury must remain in the custody and control of the Attorney General or his designee unless otherwise ordered by the court in a particular case.

S.C. Code § 14-7-1700